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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. RAYMOND KELSCH, Defendant and Respondent.	B209790 (Los Angeles County Super. Ct. No. BH004886)

APPEAL from an order of the Superior Court of Los Angeles County, Peter Paul Espinoza, Judge. Affirmed.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Jessica Blonien and Kathleen R. Frey, Deputy Attorneys General, for Plaintiff and Appellant.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Respondent.

Raymond Kelsch pleaded nolo contendere to second degree murder in July 1987. At Kelsch's sixth parole hearing, the Board of Parole Hearings (BPH) found him unsuitable for parole and deferred his next parole hearing for three years. Kelsch filed a writ of habeas corpus in the superior court, challenging the BPH's unsuitability finding. The superior court issued an order to show cause (OSC), addressed to both the BPH's unsuitability finding and the three-year deferral. The superior court found " 'some evidence' " supported the BPH's unsuitability finding, but not the deferral, and accordingly ordered the BPH to vacate that portion of its decision and conduct a new parole suitability hearing within 60 days. The People appeal the latter portion of the superior court's ruling. They contend: (1) Kelsch's habeas petition did not challenge the three-year deferral, and therefore the superior court erred by granting relief on an issue not alleged in the petition; and (2) " 'some evidence' " supported the BPH's three-year deferral. We conclude a challenge to the deferral was implicit in the petition, and the OSC was not improper. We further conclude no evidence supported the three-year deferral. Accordingly, we affirm the superior court's order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *May 2007 parole hearing and unsuitability finding.*

a. The commitment offense.

On July 16, 1987, Kelsch pleaded nolo contendere to second degree murder (Pen. Code, § 187, subd. (a))[1] and a related principal-armed firearm enhancement (§ 12022, subd. (a)). He was 45 years old at the time of the crime. The trial court sentenced him to a prison term of 16 years to life. His minimum parole eligibility date was March 24, 1997. His life term began on August 12, 1987.

The probation officer's report described the facts of the crime as follows. Kelsch and his co-defendant, Joyce Pettis, were "intimately related" and drank heavily together.

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[1] All further undesignated statutory references are to the Penal Code.

The victim, Ralph Pettis, was Joyce's husband.[2] On March 4, 1986, Long Beach police officers were called to the Pettis home because Joyce and Ralph, who were intoxicated, were arguing. Joyce told officers that if Ralph ever beat her again, she would kill him. On March 7, 1986, officers were again called to the Pettis home. They arrested both Ralph and Joyce, "because of their condition." On March 9, 1986, Ralph posted bail for himself and was released, but did not post bail for Joyce. This angered Joyce. She confided to another inmate that she was going to have Ralph killed.

Kelsch confided to a neighbor that he had arranged for a Samoan friend to "blow the victim's brains out." Ralph confided to the same neighbor that he was afraid Joyce was going to have him killed.

At approximately midnight on March 9, 1986, police were summoned to the Pettis residence and found Ralph dead of a single gunshot through the eye, which had killed him instantly. The neighbor saw Kelsch leaving the crime scene just as the police arrived.

A police investigation revealed that Jacob Ama was the shooter. Joyce had offered Ama $1,000 to kill Ralph. She had paid Ama a $200 down payment, and was "aided . . . in this regard by defendant Kelsch." Kelsch had introduced Ama to Joyce.

b. *Personal history and health.*

Kelsch was born in 1940 and, at the time of the 2007 parole hearing, was 67 years old. He suffered from scoliosis (curvature of the spine) and had two crushed discs in his back, making him unable to sit for long periods of time. He also suffered from psoriasis. He had been hospitalized in 1985, prior to the crime, for removal of a blood clot in his brain, after he was in a truck accident. He began having seizures after the surgery and took daily anti-seizure medication. He had surgery for prostate cancer while incarcerated.

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[2] For ease of reference, we refer to Joyce and Ralph Pettis by their first names.

Kelsch, who has dual United States/Canadian citizenship, finished high school, completed two years of college, and had a French degree. He was an only child, and his parents were both deceased. Prior to his incarceration, he had worked as a truck driver, an oil field worker, a special events person for a soft drink company, and a United Parcel Service driver. He had been married three times, and had seven children. One of his sons passed away in 1995, at the age of 22, from a drug overdose. Three of his children lived in Canada, and three lived in the Los Angeles area. Kelsch remained in contact with all his surviving children. Kelsch had no juvenile or adult criminal history other than the commitment offense.

c. *Prison conduct.*

Kelsch had two CDC 115's[3] while incarcerated, i.e., for possession of inmate-made alcohol in April 1988, and manufacturing alcohol in December 1989. According to Kelsch, in the first incident his "cellie was making pruno" and "when you're in a cell, if they find contraband you both get the write up." At the time of the 2007 hearing, he had not had any 115's for over 17 years. He had had two "128's,"[4] both in 1990. One was for failing to obtain a pass, and the other was for possession of excessive "hot medication." In regard to the latter, Kelsch explained that he had been prescribed Elavil[5] but stopped taking it, and approximately 10 to 12 of the unused pills were found in his cell.

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[3] A "CDC 115" refers to a rules violation report that documents misconduct that is believed to be a violation of law or is not minor in nature. (*In re Roderick* (2007) 154 Cal.App.4th 242, 249, fn. 3; Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

[4] A "Custodial Counseling Chrono" (CDC Form 128-A) documents minor misconduct and counseling provided for it. (*In re Roderick, supra,* 154 Cal.App.4th at p. 269, fn. 23; *In re Smith* (2003) 109 Cal.App.4th 489, 505; Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

[5] Although the record refers to the drug in question as "Ellaville," it appears the parties were discussing the antidepressant Elavil.

Kelsch had no "laudatory chronos" in his file for the year prior to the 2007 hearing. He had not upgraded his education while incarcerated, nor had he participated in vocational programs. He had worked as a porter, and had above average supervisor ratings in that position. At the time of the hearing, he was not working. He claimed he was teaching French every day, but his file contained no verification. He stated he had completed anger management classes, but did not have the certificates with him at the hearing. He had not reviewed his central file before the hearing to determine whether it was complete.

Kelsch's custody level was "medium A," the lowest security level for a life-term prisoner. (*In re Rico* (2009) 171 Cal.App.4th 659, 666-667; *In re Roderick, supra*, 154 Cal.App.4th at p. 256, fn. 9.)

d. *Psychological factors.*

At the time of the hearing, and consistently throughout his incarceration, Kelsch claimed to be innocent of the charges, stating he "was not involved in any of this." He asserted he did nothing more than introduce Joyce to Ama. He explained, " '[t]he husband was beating up his wife and was just supposed to get beat up himself.' " Kelsch acknowledged that Ralph should not have been killed for being a " 'wife beater,' " but should have received counseling. Kelsch stated, " '[t]here [is] not a day that goes by that he does not regret even . . . that small act' " of introducing Joyce to the shooter. He also regretted his relationship with Joyce. At the hearing, Kelsch stated that "it was a terrible, terrible thing for me to do [to] introduce Joyce Pettis to Jacob Ama. . . . I think about it every day and it never should have been. Never should have happened." When asked what had changed about him so that a similar crime would not recur, Kelsch replied, " 'If I'd known this was going to happen, I would have never talked to these individuals.' "

Kelsch's most recent psychological evaluation, prepared in April 2007, stated the following. Kelsch did not suffer from any severe mental illness. He did have impaired short term memory, complex problem solving, and abstract thinking skills. The psychologist opined: "The inmate's risk management is somewhere between the low range and the low end of the moderate range. The inmate has handled stress, compliance

and destabilizers well in the institutional setting. His parole plans do seem feasible; however, he needs to have community plans for alcohol treatment, self-help, and his religious involvement. [¶] [His] overall risk potential for future violence is in the low range on historical factors and [the] low range to low end of the moderate range on the clinical and risk management factors." (Underlining in original omitted.) The "elevations" in the "historical factors" category were Kelsch's involvement in unstable relationships and being alcohol dependent. The evaluation also noted "a big discrepancy between the inmate's account and the file account of the crime. He continues to claim his innocence. It is not possible to estimate his sense of responsibility, insight or remorse for the crime, other than to assume that he is not taking any responsibility for his actions. In either case, the situation thus renders this factor as somewhat less predictable[.]" However, Kelsch had "been consistent and stable in his belief of innocence. It is unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate." Kelsch's remorse was age-appropriate and "[h]e does accept some responsibility for the crime, as he sees it." Previous evaluators had similarly concluded Kelsch's potential for dangerousness as low or low to moderately low.

e. *Alcoholism.*

Kelsch began drinking alcohol when he was 16 or 17 years old. Prior to his incarceration, Kelsch drank beer "almost every day" but stated he did not drink "the hard stuff" or use drugs. He attended Alcoholics Anonymous (AA) meetings from 1983 to 1985, before the crime and his incarceration. He had been arrested for public intoxication. Kelsch stated he had been sober for 20 years. The psychological evaluation concluded Kelsch had "[a]lcohol [d]ependence, in sustained full remission in a controlled environment."

The psychologist found it noteworthy that "alcohol was involved in the events leading up to, and culminating in" the commitment offense. Kelsch acknowledged that he had been drinking on the day of the murder, but told the psychologist that he did not think that drinking had impaired his judgment. "Information from his record indicates

that there is more drinking involved than he acknowledges. The inmate states that he does not believe that he was drunk or that alcohol was affecting his judgment at the time. . . . He does not think that alcohol has been a major life problem for him and he does not understand a need for lifelong treatment." The psychological report recommended that he be continuously involved in AA as a condition of parole.

Kelsch had not participated in AA during the year prior to the 2007 hearing. He explained he had been attempting to get into the AA program for 16 months, but was on a waiting list. According to the psychological report, Kelsch had been active in AA "off and on" since 1987. When asked at the hearing whether he knew the AA 12-Step program, Kelsch replied, "No, not really," because his memory was not good. When asked whether any of the 12 Steps were particularly important to him, Kelsch replied, "The thing that stands out to me is that I can never drink again . . . ." When asked whether he believed alcohol played a role in the murder, he replied, "Yeah, probably did. If I'd have been cold sober I probably wouldn't have had anything to [do] with it you know. But I just probably had a few beers and [said] yeah, I'll get somebody to fix your problem, come with me. Yeah, alcohol probably had something to do with it."

f. *Post-release plans.*

Kelsch stated he planned to live with one of his daughters and her two adolescent sons in Redondo Beach, when he was released. Kelsch's daughter provided a letter stating that she had several close friends in the community who had expressed the desire to support Kelsch and had offered employment opportunities for him. Further, she "manage[d] a small amount of money for [Kelsch] that he inherited . . . and that these funds, his social security checks and employment will enable him to provide for any additional needs that he would have above shelter and food." Kelsch did not know his daughter's financial situation, but assumed she "makes pretty good money" because she lived in Redondo Beach, an expensive area. Kelsch was unsure whether his daughter lived in an apartment or a condominium, and whether it had two or three bedrooms. Kelsch opined that, "we'd probably move to another condo and get a room for me. Like I said, she makes pretty good money, so the money part wouldn't be any problem." Kelsch

stated he intended to attend AA with his daughter. She had found a sponsor for him, but Kelsch had not yet written to the sponsor.

Kelsch had an alternative plan to live with his friends, Andre and Hilda Martin, who were "like family" to him. Andre was approximately 80 years old, and Hilda was in her mid to late 70's. Kelsch did not present any documentation that the Martins had offered to house or assist him.

Kelsch believed he would be entitled to approximately $900 per month in social security benefits upon release. Additionally, he was entitled to approximately $300 per month from a Teamsters Union retirement fund. He had approximately $15,000 to $20,000 in a bank account managed by Hilda. He did not feel he would be able to work unless his back problems were corrected. He believed his social security and pension would be sufficient for his needs.

Kelsch presented no other letters of support.

g. *The BPH's decision.*

The BPH found Kelsch unsuitable for parole based on the following factors. (1) The crime was carried out in an especially heinous and cruel manner that demonstrated a callous disregard for human life; (2) Kelsch had minimized his role in the crime; (3) Kelsch had "programmed" in a limited manner while incarcerated, failing to upgrade educationally and vocationally; and (4) Kelsch had failed to sufficiently participate in self-help and therapy, and needed further self-help to face and understand the causes of the crime, especially regarding substance abuse. Kelsch needed to "demonstrate an ability to maintain gains over an extended period of time." The BPH noted a variety of favorable factors, including Kelsch's lack of criminal history; his relatively stable social background, aside from his alcoholism; the psychological evaluation's assessment of his potential for violence; and his limited record of prison discipline.

In a separately stated decision, the BPH concluded it was not reasonable to expect that parole would be granted at a hearing during the following three years. The three-

year deferral was based upon the cruel, callous nature of the crime and Kelsch's failure to participate in self-help, including in regard to substance abuse.

2. *Kelsch's habeas petition and the superior court's ruling.*

Kelsch, acting in propria persona, filed a petition for habeas corpus in the superior court on August 30, 2007. As relevant here, Kelsch alleged no evidence supported the BPH's denial of parole.[6] He complained that the unsuitability finding was flawed because the factors cited by the BPH had no nexus to public safety. He sought a new parole hearing within 30 days.

The trial court issued an OSC on January 9, 2008, ordering the Warden of Avenal State Prison to show cause why the petition should not be granted. The OSC was expressly directed "to the denial of petitioner's parole suitability as well as the Board of Parole Hearing[s'] decision to set his next suitability hearing date in three years." The superior court appointed counsel for Kelsch. The People filed a return, and Kelsch, through counsel, filed a denial.

On June 23, 2008, the superior court ruled that the record contained "some evidence" supporting the BPH's determination that Kelsch posed an unreasonable risk to society. It reasoned that the aggravated nature of the commitment offense, coupled with Kelsch's limited parole plans and his lack of insight into the offense, constituted "some evidence" supporting the unsuitability finding.

On the other hand, the superior court concluded the PBH's decision to defer Kelsch's next parole hearing was *not* supported by some evidence. The court observed that the commitment offense occurred 21 years previously; Kelsch had never personally engaged in violence and had remained discipline-free since 1989; he had received a favorable psychological report; and he had participated in programming to the extent his

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6 Kelsch's petition also alleged that his trial counsel was ineffective, his 1987 plea was not knowingly, voluntarily, and intelligently made, and his continued confinement violated the terms of his plea bargain. Those issues are not the subject of the People's appeal and are not before us.

medical conditions allowed. Although Kelsch's version of the crime might indicate he lacked insight into his role, "this alone does not provide some evidence that it is unreasonable to expect that he may be found suitable in the next three years. Should the Petitioner demonstrate that he has gained insight regarding his role in the offense or clarify his version of the events to the satisfaction of the next panel, it is not unreasonable to expect that he could be found suitable before the three-year postponement." Accordingly, the superior court issued a writ directing the BPH to vacate its decision to defer Kelsch's next hearing, and ordering it to schedule the next parole consideration hearing within 60 days.[7]

3. *Appeal and stay.*

The People appealed the superior court's ruling. (§ 1507; Cal. Rules of Court, rule 8.304, subd. (a).) We granted the People's petition for a writ of supersedeas, staying enforcement of the superior court's June 23, 2008 order until further order of this court.

DISCUSSION

1. *Kelsch's challenge to the three-year deferral was implicit in his habeas petition.*

Preliminarily, we address the People's contention that the superior court's order must be reversed because Kelsch did not expressly raise the issue of the three-year deferral in his habeas petition. Kelsch, in response, contends his challenge to the three-year deferral was implicit in his petition and, in any event, the People forfeited their contention by failing to raise any procedural challenge to the OSC below.

In a habeas proceeding, the parties' pleadings define the issues before the court. (*Board of Prison Terms v. Superior Court* (2005) 130 Cal.App.4th 1212, 1235 (*Ngo*); *In re Lugo* (2008) 164 Cal.App.4th 1522, 1541.) Only those claims raised in the original habeas petition, or in a supplemental petition, may be considered by the court; issues not raised in the pleadings need not be addressed. (*People v. Duvall* (1995) 9 Cal.4th 464,

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[7] At the time of the superior court's ruling, more than one year had elapsed since the 2007 parole unsuitability finding.

478; *Ngo, supra,* at pp. 1235, 1237; *In re Lugo, supra,* at pp. 1541-1542.) Thus, an OSC is limited to the claims raised in the petition and the factual bases for those claims. (*People v. Duvall, supra,* at p. 475; *In re Clark* (1993) 5 Cal.4th 750, 781, fn. 16.) The court is not authorized "to supplement the habeas corpus petition by adding additional claims or new factual bases for existing claims in the order to show cause." (*Ngo, supra,* at p. 1236.) "[W]ell-established rules of habeas corpus procedure provide no statutory or decisional authority that permits the superior court to issue an order to show cause that requires the respondent to address new claims *not expressly or implicitly raised in the original habeas corpus petition or supported by the factual allegations in the original habeas corpus petition,* unless those claims were raised by the petitioner in a supplemental or amended habeas corpus petition filed with the permission of the court." (*Id.* at p. 1237, italics added; *In re Lugo, supra,* at p. 1542.) Thus, where a court issues an OSC that adds a new claim, "which the petitioner had not raised in his habeas corpus petition, and *which could not be implied from or supported by the factual allegations in the petition*," the court exceeds its power. (*Ngo, supra,* at pp. 1237, 1239, italics added.) On the other hand, when crafting an OSC, a superior court does have the power to restate inartfully drafted claims for purposes of clarity. (*Ngo, supra,* at p. 1239.)

The petition, along with the return and traverse, frame the factual issues that the court must decide. (*People v. Duvall, supra,* 9 Cal.4th at pp. 476-477.) The goal of the habeas corpus procedures is to provide a framework in which a court can discover the truth and do justice in a timely manner. (*Id*. at p. 482; *Ngo, supra,* 130 Cal.App.4th at p. 1239.) To that end, "we should not construe the pleadings in . . . a parsimonious fashion." (*People v. Duvall, supra,* at p. 482 [factual allegations made in memorandum of points and authorities, but not in return itself, were arguably not incorporated into the return; nonetheless, they were sufficient to put the lower court on notice regarding the facts in dispute].)

Applying these principles here, we conclude Kelsch's challenge to the three-year deferral was implicitly included in his original petition. The petition did not expressly set forth a challenge to the three-year deferral as a separate, distinct claim. However, it

alleged that "[t]here is no evidence supporting any reason for parole denial, and no evidence of any nexus between the reasons for parole denial and petitioner's current threat to public safety, and therefore there is no legal basis to deny parole." Kelsch stated that the nature of the crime, the primary basis for the BPH's denial, did not demonstrate he was a current public safety risk. The petition stated that parole was denied for three years, and attached the CDC form so indicating. In his prayer for relief, Kelsch sought a ruling that no evidence supported the "2007, (BPH) Decision" and mandating a new parole hearing within 30 days. Kelsch's subsequently-filed denial expressly stated he was challenging the BPH's three-year deferment.

Thus, Kelsch's challenge to the three-year deferral was necessarily subsumed within his challenge to the unsuitability finding. When he claimed there was no basis for the unsuitability finding, Kelsch necessarily implied that keeping that unsuitability finding in effect for three years was also unlawful. By stating that no evidence supported the BPH's 2007 decision–which included both the unsuitability finding and the deferral–Kelsch stated a challenge to both. As we discuss *post*, both issues were based upon the same factual questions and governed by similar standards. The superior court's OSC did no more than restate an inartfully drafted claim for purposes of clarity. (See *Ngo, supra,* 130 Cal.App.4th at p. 1239.)

Moreover, the People, in their return, specifically acknowledged, "[p]etitioner . . . challenges the [BPH's] May 2007 decision denying petitioner parole *and deciding to defer further consideration of parole for three years.*" (Italics added.) The People raised no challenge to inclusion of the deferral issue in the OSC. It therefore must have appeared clear to the parties and the court that a challenge to the deferral was implicit in the petition. A contrary conclusion would not further the goal of the habeas procedures to provide a framework in which a court can discover the truth and do justice in timely fashion. (See *People v. Duvall, supra,* 9 Cal.4th at p. 482; *Ngo, supra,* 130 Cal.App.4th

at p. 1239.) Accordingly, we reject the People's contention that the issue of the deferral was not properly raised in the petition,[8] and proceed to consideration of the merits.

2. *Standard of review.*

Because the superior court's decision was based solely upon documentary evidence, we independently review its ruling. (*In re Hyde* (2007) 154 Cal.App.4th 1200, 1212; *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677.)

Our review of the BPH's decision, however, is deferential. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1204; *In re Shaputis* (2008) 44 Cal.4th 1241, 1254; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 665; *In re Lugo, supra,* 164 Cal.App.4th at p. 1537.) "[T]he judicial branch is authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law, but . . . in conducting such a review, the court may inquire only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulation." (*In re Rosenkrantz, supra,* at p. 658.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence" are matters within the authority of the BPH. (*Id.* at p. 677; *In re Lawrence, supra,* at pp. 1204-1205.) "[T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor [or BPH], but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the . . . decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in

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8 Given our resolution of this issue, we do not reach Kelsch's contention that by failing to raise a procedural challenge to the OSC below, the People forfeited their claim that the petition did not raise the deferral issue.

the record that supports" the decision. (*In re Rosenkrantz, supra,* at p. 677; *In re Shaputis, supra,* at pp. 1260-1261; *In re Lawrence, supra,* at p. 1204.) This same standard applies to the BPH's decision to defer an inmate's parole hearing after a parole denial. (*In re Burns* (2006) 136 Cal.App.4th 1318, 1326.)

3. *Applicable law.*

At the time Kelsch's 2007 parole hearing was held,[9] section 3041.5 provided that after an inmate is found unsuitable for parole, the BPH must conduct subsequent parole consideration hearings annually. (Former § 3041.5, subd. (b)(2); *In re Burns, supra,* 136 Cal.App.4th at p. 1326.) If the inmate was convicted of murder, however, the hearing could be deferred for up to five years if the BPH found it was "not reasonable to expect that parole would be granted at a hearing during the following years . . . ." (Former § 3041.5, subd. (b)(2)(B); *In re Lugo, supra,* 164 Cal.App.4th at p. 1536; *In re Burns, supra,* at p. 1326.) "The [BPH's] decision to defer the annual hearing must be guided by the same criteria used to determine parole suitability. [Citation.] Thus, the reasons for refusing to set a parole date need not be completely different from the reasons for excepting an inmate's case from annual review." (*In re Burns, supra,* at p. 1326; *In re Lugo, supra,* at p. 1537; *In re Jackson, supra,* 39 Cal.3d at p. 479.) The suitability determination attempts to predict the risk to public safety, while the postponement

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9 Section 3041.5 was amended by Proposition 9, section 5.1 (Marsy's Law), at the November 4, 2008 election, effective November 5, 2008. Proposition 9 made significant changes to the time period during which subsequent parole hearings must occur after a parole denial. As explained by the Legislative Analyst's analysis to the initiative, the new law extends "the time before the next hearing to between 3 and 15 years," rather than the 1 to 5 years under the previous law. (See Ballot Pamp., Gen. Elec. (Nov. 4, 2008) analysis of Prop. 9 by the Legislative Analyst, p. 60.) Neither party asserts that the amended version of the law applies here. Criminal statutes are presumed to operate only prospectively, absent some clear indication the Legislature intended otherwise (§ 3), and application of the amended law could conceivably implicate ex post facto principles. (See *In re Jackson* (1985) 39 Cal.3d 464, 471-473, 476-477.) We express no opinion on the matter, which has not been raised or briefed by the parties. Instead, we apply the version of the statute in effect when the parole hearing was conducted.

determination attempts to predict that the risk is likely to continue for at least as long as the period of the postponement. (*In re Jackson, supra,* at p. 478.) These questions are related, but not identical. (*Ibid.*) We may therefore consider the BPH's discussion of parole unsuitability for the purpose of illuminating the BPH's reasons justifying the postponement. (*In re Burns, supra,* at p. 1328.) The BPH must identify the reasons justifying the postponement. (*Id.* at p. 1326; *In re Jackson, supra,* at p. 479.)

In determining suitability for parole, the BPH must consider certain factors specified by regulation.[10] (*In re Lawrence, supra,* 44 Cal.4th at p. 1202; Cal. Code Regs., tit. 15, § 2402, subds. (c), (d).) Circumstances tending to establish unsuitability for parole include that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) has a previous record of violence; (3) has an unstable social history; (4) has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison or jail. (Cal. Code Regs., tit. 15, § 2402, subd. (c); *In re Lawrence, supra,* at p. 1202, fn. 7; *In re Rosenkrantz, supra,* 29 Cal.4th at pp. 653-654; *In re Gray* (2007) 151 Cal.App.4th 379, 399-400.)

Circumstances tending to show suitability for parole include that the inmate (1) does not have a juvenile record of assaulting others or committing crimes with the potential of personal harm to victims; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his or her life,

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10 "Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (Cal. Code Regs., tit. 15, § 2402, subd. (b).)

especially if the stress built up over a long period; (5) committed the crime as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release, or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities suggesting an enhanced ability to function within the law upon release. (Cal. Code Regs., tit. 15, § 2402, subd. (d); *In re Lawrence, supra,* 44 Cal.4th at p. 1203, fn. 8; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 654.)

The foregoing factors are general guidelines, and the BPH must consider all reliable, relevant information. (Cal. Code Regs., tit. 15, § 2402, subd. (b); *In re Lawrence, supra,* 44 Cal.4th at p. 1203; *In re Shaputis, supra,* 44 Cal.4th at p. 1257; *In re Gaul* (2009) 170 Cal.App.4th 20, 31.) The paramount consideration is public safety. (*In re Shaputis, supra,* at p. 1254; *In re Lawrence, supra,* at pp. 1205, 1210; *In re Rico, supra,* 171 Cal.App.4th at p. 671.)

4. *Application here.*

Many of the factors to be considered by the BPH supported a finding of *suitability,* and therefore cannot support the three-year deferral. Kelsch had no juvenile or adult record; the commitment offense was his only crime. (See *In re Palermo* (2009) 171 Cal.App.4th 1096, 1109.) His age, 67 at the time of the 2007 hearing, reduces the probability of recidivism, as do his health problems. His prior work experience, and his entitlement to a pension and social security benefits, suggest that he has some means of support upon release. He has had little serious misconduct while incarcerated, and, at the time of the hearing, had been completely discipline-free for 17 years. His crime did not involve sexual offenses. (See Cal. Code Regs., tit. 15, § 2402, subd. (d).)

Kelsch's lack of vocational programming or "educational upgrades" while incarcerated does not provide evidence of his unsuitability for parole or the three-year deferral. As the superior court correctly observed, due to Kelsch's medical problems and age, he was unable to participate in vocational programming. He already had a two-year college degree. Further, he had savings of between $15,000 and $20,000 and was entitled to social security benefits and a pension, providing him with approximately $1,200 per

month in income. Kelsch had work experience prior to his incarceration. Thus, Kelsch would have been able to support himself upon release, and his lack of vocational programming does not weigh against his suitability. Indeed, the BPH Commissioner told Kelsch he did "not recommend" that Kelsch participate in vocational training at this point in time, because it was "senseless." Thus, Kelsch's lack of vocational training while incarcerated does not support the three-year deferral, and was not cited by the BPH as an unsuitability factor.

Kelsch's parole plans likewise did not provide a basis for the three-year deferral. There was some evidence that Kelsch's parole plans were not fully developed. Kelsch claimed to have an offer to live with the Martins, but he presented no documentation, and in any event the BPH reasonably questioned whether the Martins could provide meaningful assistance, given their advanced ages. Kelsch did present a letter from his daughter, offering to allow him to live with her. However, Kelsch was unclear regarding the nature of her residence, i.e., whether it contained sufficient space to reasonably house him along with his two grandsons. Kelsch had no factual information regarding the daughter's ability to support him, but merely assumed she was affluent because she lived in Redondo Beach. We assume arguendo that on this showing, the BPH could reasonably find Kelsch's parole plans tended toward a finding of unsuitability. (See Cal. Code Regs., tit. 15, § 2402, subds. (b), (d)(8).)

However, any deficiency in Kelsch's plans for release could have been resolved within the following year. Certainly, it would not have taken Kelsch three years to provide further documentation and additional information regarding his living plans, or to explore the possibility of a transitional home, as suggested by the BPH, and obtain additional support letters. These tasks could all have been accomplished within a one-year period. Thus, Kelsch's post-release plans did not provide some evidence that it was unreasonable to expect parole would be granted within the next year.

The BPH's conclusion the crime was especially heinous was supported by some evidence. The regulations specify the factors the BPH should consider in determining whether an offense was "especially heinous, atrocious or cruel." Those factors are:

(1) multiple victims were attacked, injured or killed in the same or separate incidents; (2) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (3) the victim was abused, defiled, or mutilated during or after the offense; (4) the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering; and (5) the motive for the crime is inexplicable or very trivial in relation to the offense. (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1).)

Evaluating these principles here, factor (2) is supported by "some evidence." There was ample evidence the crime was "carried out in a dispassionate and calculated manner." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(B).) The crime was a premeditated murder-for-hire. These facts were more than minimally necessary to sustain a second degree murder conviction because they demonstrated premeditation. (See *In re Dannenberg* (2005) 34 Cal.4th 1061, 1095.) Premeditation, deliberation, and willfulness are not elements of second degree murder. (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.)[11]

The nature of the inmate's offense can, by itself, constitute a sufficient basis for denying parole–and, by parity of reasoning, for deferring parole consideration–but this is rarely the case. (*In re Lawrence, supra,* 44 Cal.4th at pp. 1211, 1221; *In re Shaputis,*

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11 The remaining factors showing offense was "especially heinous, atrocious or cruel" are not present. Multiple victims were not attacked. The victim was not abused, defiled, or mutilated during or after the offense. Nor can we say the offense was carried out in a manner demonstrating an exceptionally callous disregard for human suffering. The single, instantaneously fatal gunshot at issue here cannot be characterized as exceptionally callous. Kelsch and his cohorts did not choose an especially painful or slow method for the killing, did not attempt to prolong or exacerbate the victim's suffering, did not terrorize, taunt, or torment the victim, and did not attempt to prevent him from obtaining aid. (*In re Rico, supra,* 171 Cal.App.4th at p. 682.) The record suggests the crime was committed in retaliation for the victim's violent beating of his wife, but the information on this point is limited and unclear; therefore, we express no opinion on whether the motive for the crime was trivial in relation to the offense. (See generally *In re Rico, supra,* at p. 682.)

supra, 44 Cal.4th at p. 1255; *In re Rosenkrantz, supra,* 29 Cal.4th at p. 682; see also *In re Scott* (2005) 133 Cal.App.4th 573, 594.) The "relevant inquiry is whether the circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of current dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude." (*In re Lawrence, supra,* at p. 1221; *In re Shaputis, supra,* at pp. 1254-1255.) "[A]lthough the Board and the Governor may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." (*In re Lawrence, supra,* at p. 1214.)

The nature of the commitment offense does not provide "some evidence" that Kelsch currently poses a danger, and therefore cannot provide support for the three-year deferral. It was undisputed that Kelsch was not the actual killer. While his involvement in the crime in any respect is inexcusable, his role appears to have been largely limited to introducing the victim's wife to the shooter. Moreover, Kelsch had no juvenile or adult record; the commitment offense was his only crime. He has not committed any violent offenses before or since. All the evidence therefore points to the conclusion that his involvement in the crime was an isolated incident, unlikely to recur. "The killing was defendant's first criminal offense, and he has not committed any violent acts during the . . . years since the murder – facts that indicate the killing was an isolated incident which does not 'realistically constitute a reliable or accurate indicator of [his] current dangerousness." (*In re Palermo, supra,* 171 Cal.App.4th at p. 1109.)

Nor can it be said that Kelsch's purported lack of insight into the crime supports the deferral. The superior court concluded that Kelsch's lack of insight was a factor supporting the BPH's unsuitability finding, but not the three-year deferral. The superior court reasoned that, should Kelsch demonstrate he had gained insight regarding his role in the offense, he could be found suitable before the three-year period. We agree. Assuming arguendo that Kelsch's purported lack of insight actually supported the unsuitability finding,[12] and also assuming arguendo that the BPH based the three-year deferral on this factor,[13] there is no evidence whatsoever that he would necessarily have been unable to gain sufficient insight before one year had passed.

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[12] A lack of insight may, in some circumstances, support an unsuitability finding. (*In re Lawrence, supra*, 44 Cal.4th at p. 1228; *In re Shaputis, supra*, 44 Cal.4th at p. 1260 [lack of insight supported unsuitability finding where the inmate had brutalized his wife for years before killing her, his continuing claim that the killing was unintentional was contradicted by undisputed evidence, and a prison psychologist opined that his character was unchanged]; *In re Rozzo* (2009) 172 Cal.App.4th 40, 61-62, fn. 9; *In re Smith* (2009) 171 Cal.App.4th 1631, 1638-1639; cf. *In re Palermo, supra*, 171 Cal.App.4th at pp. 1110-1112 [purported lack of insight into the crime did not support an unsuitability finding where the defendant's version of the shooting was not impossible and did not strain credulity, he had accepted responsibility for the crime and expressed remorse, he had participated in rehabilitative programs while incarcerated, and the evaluating psychologists opined that he did not represent a risk of danger if released].) We observe that here, the psychologist opined, when evaluating Kelsch's insight into the crime, that it was "unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate." As the question is not before us, we express no opinion on whether, under these circumstances, Kelsch's purported lack of insight into the crime amounted to some evidence supporting the unsuitability finding in the first instance.

[13] It is not entirely clear that the BPH concluded Kelsch's lack of insight was a factor supporting the three-year deferral. In the portion of the decision addressing the deferral, the BPH commissioner observed that Kelsch's psychological evaluation was somewhat contradictory "regarding [Kelsch's] level of insight," but also noted that the evaluation was favorable to Kelsch. The commissioner stated that "the prisoner has not completed the necessary programming, which is essential to his adjustment and needs additional time to again, set to gain such programming and again, in regards to substance abuse and further self-help for himself," but did not specifically mention lack of insight.

Finally, we address the sole remaining factor offered in support of the BPH's finding, i.e., that Kelsch has failed to address his alcoholism. Whether or not this factor constituted some evidence of unsuitability–a question that we do not address–it did not provide some evidence supporting a three-year deferral. There was evidence before the BPH that Kelsch's alcoholism skewed his judgment and contributed to his decision to participate in the crime by introducing Joyce to the shooter. At his sentencing hearing, Kelsch's counsel observed that Kelsch was a "severe alcoholic" during the period the offense occurred. Counsel observed the crime was due to "people [getting] together in an alcoholic condition" and Kelsch's involvement "was almost totally caused by his alcoholism." The 2007 psychologist's evaluation found it noteworthy that "alcohol was involved in the events leading up to, and culminating in" the commitment offense. When asked at the hearing about his level of alcohol use at the time of the crime, Kelsch stated: "I was drinking, I drank everyday. I drank beer everyday." When asked at the parole hearing whether he believed his involvement with alcohol played a role in his participation in the crime, Kelsch replied: "Yeah, probably did. If I'd have been cold sober I probably wouldn't have had anything to [do] with it you know. But I just probably had a few beers and [said] yeah, I'll get somebody to fix your problem, come with me. Yeah, alcohol probably had something to do with it."

There was contradictory evidence regarding whether Kelsch had adequately addressed his drinking problem while incarcerated. The psychological evaluation noted that at the time of the crime, "there [was] more drinking involved than [Kelsch] acknowledges." Kelsch told the psychologist in 2007 that he did "not think that drinking impaired his judgement" at the time of the crime. When asked by the psychologist what had changed so that "something like this would not happen again," Kelsch did not reference abstaining from alcohol, but instead replied that he would not get involved in other people's business, and if he had known what was going to happen, he would " 'have never talked to these individuals.' "

Kelsch claimed to have attended AA meetings between 1983 and 1985, before his incarceration. While incarcerated, he participated in AA in an "off and on" fashion since

1987. At the time of the hearing he was neither enrolled in AA nor engaging in formalized independent study. However, he explained that he had been attempting to obtain entrance into the AA program for over a year, but remained on the waiting list. He claimed to have a 12-step book that he read often, but he did not know the 12 steps because of his failing memory. When asked which step was particularly important to him, he stated: "The thing that stands out to me is . . . I can never drink again . . . ." The psychologist's report stated that Kelsch's alcohol dependence was "in sustained full remission" in a controlled setting. Although Kelsch had been disciplined in 1988 and 1989 for manufacture and possession of alcohol, and in 1989 for possession of stimulants or sedatives, he had not been disciplined for similar conduct since that time. Thus, at the time of the 2007 hearing, it had been at least 17 years since his last substance-abuse-related conduct. In short, the evidence showed Kelsch had been sober for the preceding 17 years.

Under these circumstances, it was unreasonable for the BPH to conclude that the issues related to Kelsch's alcohol abuse could not be addressed within one year. Kelsch could, for example, have begun attending AA meetings regularly, more fully articulated his understanding of the 12 steps, or taken other action to demonstrate he had fully addressed his alcoholism. The BPH did not explain why it believed the issue of Kelsch's failure to participate in self-help related to his alcoholism could not have been successfully remedied within a year.

In sum, the three-year deferral was not supported by any evidence. (See generally *In re Lawrence*, *supra*, 44 Cal.4th at p. 1204.) Because there is no evidence supporting the three-year deferral, the superior court's order is affirmed.

DISPOSITION

The superior court's order is affirmed. Because over two years have passed since Kelsch's last parole hearing, the Board of Parole Hearings is ordered to hold a new parole hearing within 30 days of the issuance of the remittitur in this matter.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.